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83-1194

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

GEORGE THOMAS CULLEN,

Petitioner,

v.

HORTENSE MARIE CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

Are the state courts precluded by the doctrine of federal preemption over military retirement benefits from applying state community property laws in dividing the military retirement benefits granted for disability pursuant to Title 10 U.S.C., Sections 1201, 1202?

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Petitioner, GEORGE THOMAS CULLEN, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One, rendered in those proceedings on July 26, 1983; denial of rehearing on August 15, 1983; denial of petition for hearing before the California Supreme Court on October 20, 1983.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, appears at Appendix A.

JURISDICTION

The order on judgment of the Court of Appeal of the State of California was entered on October 20, 1983. This petition for certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioner and respondent were married on April 23, 1948. The petitioner had entered the service of the United States Army on January 6, 1941, and while on active duty with the United States Army, he received a disabling injury.

Effective August 8, 1961, the United States Army retired the petitioner due to disability, pursuant to 10 U.S.C.,

Sections 1201, 1202. The petitioner is now rated as 100% disabled.

At the time of being involuntarily retired for disability, pursuant to 10 U.S.C., Sections 1201, 1202, the petitioner had active duty service time of nineteen (19) years, eight (8) months, and twenty-seven (27) days.

The length of active duty service requirements for longevity (length of service) retirement with the United States Army, pursuant to 10 U.S.C., Section 3925, is twenty (20) years active duty service.

The petitioner never vested, nor received any retirement benefits pursuant to longevity retirement per 10 U.S.C., Section 3925.

The compensation received by the petitioner is classified as Veterans Administration Disability Compensation.

The trial court ruled that the respondent wife had an interest in

Petitioner's disability income based upon state community property laws upon a theory that said disability income replaced what would have been received as retirement benefits. Petitioner appealed from the trial court's decision, and the Court of Appeal of California, Fourth Appellate District, Division One, affirmed the trial court. The California Supreme Court denied Petitioner's request for hearing on October 20, 1983.

REASONS FOR GRANTING THE WRIT

The case of McCarty v. McCarty (1981) 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728, held that federal law preempts the application of state community property statutes and case decisions which seek to divide military retirement benefits granted to the service member pursuant to federal legislation.

The continued application of the doctrine of federal preemption was

followed by this Court in Ridgway v. Ridgway (1981) 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39, wherein this Court struck down a state court ruling which required a service member to retain a Servicemen's Group Life Insurance policy in effect, insuring the service member's life for the benefit of his minor children.

The Supremacy Clause of the Constitution of the United States, as construed by Chief Justice Marshall in McCulloch v. Maryland (1819) 4 Wheat. 316, held that the states have no power to retard, impede, burden or control the operation of the constitutional laws enacted by Congress. Id. at 463.

Gibbons v. Ogden (1824) 9 Wheat. 1, 6 L.Ed. 23, demonstrated that state action which is incompatible with the legitimate exercise of the power of the federal government causes the state action in question to be invalid.

The application of the McCarty and Ridgway doctrines to the case at hand cannot be controverted. The instant case was active on appeal upon the very issue before this Court, and therefore entitled to prospective application of said doctrines.

The viability of the ruling in McCarty continues, except as to the modifications of the application of the McCarty principles created by the enactment of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), 10 U.S.C, Section 1408.

It can be argued that Congress, by enactment of 10 U.S.C., Section 1408, has returned to the several states the power to divide the service member's military retirement benefits pursuant to that state's respective laws. Congress has not, by its legislation embodied within 10 U.S.C., Section 1408, rejected the

continuing viability of the doctrine of federal preemption in the field of authority of regulation and control over the area of federal military retirement benefits. Congress has authorized the states to apply state community property laws to divide "disposable retired or retainer pay," except that it specifically excludes from that authorization to divide "retired or retainer pay of a member retired for disability," under Chapter 61 of Title 10 U.S.C., of which Sections 1201, 1202 are a part.

> "(c) Specifically provides for the payment of an amount expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member." 10 United States Code, Section 1408(a)(2)(c).

In Title 10 United States Code, Section 1408(a)(4), the act speaks to disability as follows:

> "(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this Title) less amounts which . . ." 10 United States Code, Section 1408(a)(4) (emphasis added).

The facts of the instant case are clear. Petitioner, GEORGE THOMAS CULLEN, was retired from active duty military service for disability reasons. Said action was involuntary, and not the result of any request from the petitioner.

Upon the action of the United States Army, it was determined that effective August 8, 1961, GEORGE THOMAS CULLEN, Petitioner herein, would be retired pursuant to 10 U.S.C, Sections 1201, 1202. The action of the Department of the Army on that date caused the petitioner's military career to end with nineteen (19) years, eight (8) months, and twenty-seven (27) days active duty service.

Eligibility for retirement for length of service by an enlisted member in good standing is controlled by Title 10 U.S.C, Sections 3914 and 3925, which state:

> "Under regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service computed under Section 3925 of this title may, upon his request, be retired. A regular enlisted member then becomes a member of the Army Reserve. A member retired under this section shall perform such active duty as may be prescribed by law until his service computed under Section 3925 of this title, plus his inactive service as a member of the Army Reserve, equals 30 years. As amended September 8, 1980, Pub.L. 96-343, Section 9(a)(1), 94 Stat. 1128. 10 U.S.C., Section 3914.

Section 3925 of Title 10 controls the computation of how years of service are computed:

> "(a) For the purpose of determining whether an enlisted member of the Army may be retired under Section 3914 or 3917 of this title, and of computing his retired pay under Section 3991 of this title, his years of service are computed by adding all active service in the armed forces and service computed under Section 3683 of this title." 10 U.S.C., Section 3925.

Section 3683 of Title 10 dealt with service credit of nurses and civilian medical personnel, and had no application to this case.

The trial court, as well as the California Court of Appeal, Fourth Appellate District, Division One, erroneously applied Title 10 U.S.C., Section 1405, which is a section which deals with computation of years of service for "computing basic pay" and, namely, Chapter 71, of Title 10 U.S.C, entitled "Computation of Retired Pay," which encompasses Section 1405 of Title 10.

The trial court ruled that service of nineteen and one-half (19 1/2) years of active duty service constituted twenty (20) years service pursuant to 10 U.S.C. 1405, irrespective of the requirements of 10 U.S.C., Section 3925.

The Court of Appeal, in its written opinion, relied heavily upon 10 U.S.C., Section 1405, quoting from said section in its opinion, although the quoted language had been deleted when the statute had been amended in 1980, almost three years prior to the Appellate Court's decision.

The application of the ruling of the California Court of Appeal, Fourth Appellate District, Division One, will do substantial harm to the federal statutory scheme which intends that the disabled veteran receive the disability benefits being awarded to the service person injured while in the active service of the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One.

Dated: 1-16-84

Respectfully submitted,

BLATCHLEY & SHEPERSKY

William E. Blatchley

By: _____
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Attorneys for Petitioner

APPENDICES

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of George Thomas and Hortense Marie Cullen	)	
GEORGE THOMAS CULLEN, Appellant, v. HORTENSE MARIE CULLEN, Respondent.	)	4 Civ.No. 22908 (Super. Ct. No. D 120720)

APPEAL from a judgment of the Superior Court of San Diego County, Carlos A. Cazares, Judge. Affirmed.

William E. Blatchley for Appellant.

Fred E. Corbin and Patrick L. Prindle for Respondent.

Husband George Thomas Cullen appeals a judgment awarding wife Hortense Marie Cullen a one-half interest in 13/20ths of what he would have received for longevity retirement as a member of the United

States Army if he had served 20 years active service. The husband, in fact, retired after active service of 19 years, 8 months and 27 days; 3 months and 3 days short of 20 years.

FACTS

George Thomas Cullen and Hortense Marie Cullen were married on April 24, 1948, and separated after 29 years of marriage. When the marriage occurred, the husband had served 6 years, 10 months and 23 days in the Army. He continued his Army service until he retired with a 100 percent disability on August 8, 1961. The compensation he received for his disability was classified as a Veterans' Administration Disability Compensation.

DISCUSSION

I

The husband contends this case is controlled by In re Marriage of Jones, 13 Cal.3d 457, and not by the rule of In re

Marriage of Stenquist, 21 Cal.3d 779 (Stenquist I).

> "[A] married serviceman's right to disability pay, unlike a vested right to retirement pay, does not comprise a community asset and thus does not become subject to division upon dissolution of the marriage." (Jones, supra, at p. 459.)

The Jones case held the pay was to compensate the veteran for personal anguish caused by the permanent disability as well as the loss of earnings resulting from premature military retirement and the diminished ability to compete in the civilian job market. (Ibid.)[1]

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[1]See also In re Marriage of Olhausen, 48 Cal.App.3d 190, 192; In re Marriage of Loehr, 13 Cal.3d 465, holding military retirement pay is not community property where the retirement has been for disability and occurs before the serviceman has earned a vested right to retire for longevity.

The California Supreme Court in Stenquist I, supra, 21 Cal.3d 779, held the husband's disability pay was community property. The court reasoned that to permit a husband by unilateral election to receive a disability pension would permit him to transmute community property into his own separate property and thus would negate the protective philosophy of community property law as set out in previous decisions of the California Supreme Court. In Stenquist I, the husband's right to retire for longevity had accrued at the time he elected to retire under disability provisions. By choosing the disability retirement, the husband received a 10 percent higher pension.

Since the decision in Stenquist I there have been a series of gyrations in the divisibility upon dissolution of the marriage of military retirement pensions.

For example, the United States Supreme Court overtook McCarty v. McCarty, 453 U.S. 210 [101 S.Ct. 2728], and held a federal statute prohibits division of military retirement pensions and preempts state community property law. Following McCarty, on February 3, 1981, Congress enacted the Uniformed Services Former Spouses' Protection Act (the Act), Public Law No. 97-252, as an amendment to title X of the United States Code. The Act overrules McCarty: retirement pay for pay periods beginning after June 25, 1981, may be treated either as property solely of the member or as property of the member and his spouse according to the law of that jurisdiction. (10 U.S.C. § 1408(c)(1).) Thus, McCarty is no longer the law; McCarty's retroactivity is now mute. (In re Marriage of Buikema, 139 Cal.App.3d 689.) These gyrations do not dispose of the issue in this case.

II

The first real hurdle is whether this case is controlled by In re Marriage of Jones, supra. Jones involved an eight year marriage with twelve years of military service at the time of the husband's disability. Jones was not concerned with disability granted after the serviceman had earned, by longevity of service, a right to retirement. Stenquist I decided a different issue: the court did not permit the serviceman's election of a disability pension to defeat the community interest in his right to a pension based upon longevity.

The trial court order here decreed the wife receive one-half interest in 13/20ths of what the husband would have received for longevity retirement if he had served 20 years active service based on a rate E-7. These facts are controlling: The husband suffered an injury

while on active duty and retired. On August 8, 1961, the husband's retirement from the United States Army became effective; when he retired he had served only 19 years, 8 months and 27 days of active duty military service and thus his right to retirement for longevity had not accrued as in Jones. However, the trial court took judicial notice of title X sections 1201, 1202 and 1405, of the United States Code, and in particular section 1405, which states:

> "For the purposes of this section, a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded."

Further, the husband chose to waive his United States Army retirement pay and to receive disability pay only after he began receiving the retirement pay. The trial court's decision is based upon a factual finding the husband's right to retire had

in fact vested by his service of more than 19 and 1/2 years. Thus, the trial court applied the Stenquist I rule since the right to retirement pay had actually vested. The question remains whether the Stenquist I rule is still effective law.

III

The validity of Stenquist I is challenged in a parallel case decided this day, In re Marriage of Stenquist, ____ Cal.App.3d _____, 4 Civil No. 28033 (Stenquist II). Congress, in enacting the Act, provided:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.". (10 U.S.C. §1408(c)(1).)

However, in defining "disposable retired or retainer pay," Congress specifically excluded "the retired pay of a member retired for disability under chapter 61 of this title." (Tit. X, U.S.C. 1408(a)(4).) Thus, it is argued, Congress has not accorded the states power to apply state community property laws to military disability pay as was done in Stenquist I. It is further argued, any attempt by the California Legislature or judicial authorities to exercise power over the husband's disability pay and to whom it may be given is void as an unconstitutional infringement upon the powers of Congress protected by the supremacy clause of the United States Constitution, article VI, clause 2. Under the supremacy clause, the rights and expectancies established by federal law are protected against the operation of state law which might otherwise frustrate and erode federal

congressional policy. (See Ridgway v. Ridgway, 454 U.S. 46 [102 S.Ct. 49, 54-55].)

This argument relies upon the Act's failure to address whether disability retirement pay may or may not be treated by state courts as property of the member and his or her spouse. This omission is read to prohibit the State of California from treating disability retirement pay as community property. Nothing in the Act nor in case law warrants a conclusion that Congress by merely by failing to include disability pay in the definition of "disposable retired or retainer pay" intended to deprive the state courts of jurisdiction to determine the individual or community character of disability retirement pay in family law proceedings. The correct standard for review under the supremacy clause was stated by the United States Supreme Court recently in

Hisquierdo v. Hisquierdo, 439 U.S. 572 at page 581 [99 S.Ct. 802]:

> "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. [Citation.]"

Hisquierdo also said:

> "[S]tate interests 'should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests will suffer major damage if the state law is applied." (Id., at p. 595.)

It should be further noted that California law generally treats disability retirement pay as separate property of the Armed Forces. (In re Marriage of Jones, supra.) However, here, as in Stenquist I, the judgment awards only a portion of the husband's disability retirement pay to his

former spouse because he was eligible to receive either disability or nondisability retirement pay. After having received nondisability retirement pay, the husband then waived it and elected to receive the disability pension of a higher amount. The trial court here, as in Stenquist I, treated the excess due to the disability retirement as additional compensation attributable to the husband's disability. There is no positive indication of congressional intent to preempt the basic state policy preventing a marital partner from depriving the other spouse of a vested community property right by a unilateral decision based upon the well-recognized rule that disability payments are the separate property of the spouse. The compromise and rule adopted by our Supreme Court in Stenquist I appears to give full recognition to the character of the disability payment, but at the same

time recognizes the basic right of a spouse not to be deprived of a community asset by the voluntary act of another.

Judgment affirmed.

CERTIFIED FOR PUBLICATION

/s/
STANIFORTH, J.

WE CONCUR:

/s/
COLOGNE, ACTING P.J.

/s/
WORK, J.

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